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April 11, 1996

FCC MAIL ROOM

William F. Caton, Acting Secretary  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Dear Secretary Caton:

Please accept these comments for filing in response to the Commission's *Notice of Proposed Rule Making*, FCC 96-119, WT Docket No. 96-59 and GN Docket No. 90-314.

We have enclosed an original plus ten copies. In addition to the original and four copies for the formal filing requirement, we would like for each Commissioner to receive a personal copy. Also, if possible, please forward one copy to Mr. Mark Bollinger, Auctions Division, Wireless Telecommunications Bureau, 2025 M Street N.W. (phone no. 418-0660). We greatly appreciate your assistance in this.

Thank you.

Sincerely,

  
David McCarty

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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APR 12 1996

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In the Matter of )

)  
Amendment of Part 20 and 24 of the )  
Commission's Rules -- Broadband )  
PCS Competitive Bidding and the )  
Commercial Mobile Radio Service )  
Spectrum Cap )

WT Docket No. 96-59

)  
Amendment of the Commission's )  
Cellular PCS Cross-Ownership Rule )  
)

GN Docket No. 90-314

COMMENTS OF RENDALL AND ASSOCIATES

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## I. Introduction

Rendall and Associates is pleased to submit these comments in response to the Commission's March 20, 1996 *Notice of Proposed Rule Making* (FCC 96-119) in WT Docket 96-59 and GN Docket 90-314.

Rendall and Associates (RAA) is a company incorporated under the laws of the State of North Carolina. The company was formed to provide consulting services to all facets of the telecommunications industry. RAA's President, David S. Rendall, has a long-standing reputation in the industry as a dynamic innovator. RAA is known for its vision in strategic planning and business development.

Over the past two years RAA has invested substantial amounts of time and money in developing innovative PCS technology and has been aggressively developing business plans to introduce a regional, low cost, consumer-oriented PCS service offering. We have been joined in this activity by several Independent Telephone Companies and equipment designer/vendors who share our entrepreneurial business philosophy.

We are very concerned that several of the proposals articulated in the March 20 *Notice of Proposed Rule Making (Notice)*, if adopted, would in fact result in a substantial lessening of the ability of small businesses and rural telephone companies to participate meaningfully in the development of broadband PCS. Our comments here focus exclusively on those aspects of the *Notice* which we believe would most seriously impact the ability of these companies to offer innovative PCS applications to the public. Our comments reflect the perspectives of both small entrepreneurs and rural telephone

companies. In general, they oppose any efforts to encourage consolidation of spectrum beyond what is already allowed by the Commission's PCS rules.<sup>1</sup> In addition, they propose rule modifications which would effectively curtail the ability of well financed entities to drive bidding levels beyond the reach of the small businesses and rural telephone companies for whom the F block licenses are mainly intended.

## II. Discussion

The Commission has clearly demonstrated its intention<sup>2</sup> and its mandate<sup>3</sup> to ensure that small businesses and rural telephone companies (as well as minority- and women-owned businesses<sup>4</sup>) have adequate opportunities to participate in broadband PCS. Moreover, Congress has given the Commission a mandate to "ensure that new and innovative technologies are readily accessible to the American public by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants."<sup>5</sup>

We are very concerned that several of the proposals articulated in the March 20 *Notice*,<sup>6</sup> if adopted, would in fact contradict the Commission's stated intentions and contravene the Commission's Congressional mandates.

The Commission has previously acknowledged that smaller players would be unable "to realize meaningful opportunities for participation in broadband PCS unless

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<sup>1</sup> Generally, these rules limit cellular operators to 35 MHz of aggregated cellular and PCS spectrum in any one geographic area and PCS licensees to 40 MHz in any one geographic area. If SMR services are included, the limitation on spectrum is increased to 45 MHz for any one geographic area.

<sup>2</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Memorandum Opinion and Order*, PP Docket 93-253, 9 FCC Rcd 5532 (1994).

<sup>3</sup> 47 U.S.C. Sec. 309(j)(4)(D).

<sup>4</sup> We are not in a position to comment on issues raised by *Adarand*. Our concern is that opportunities for small businesses and rural telephone companies to participate in PCS be protected.

<sup>5</sup> 47 U.S.C. Sec. 309(j)(3)(B), emphasis added.

<sup>6</sup> *Notice of Proposed Rule Making*, FCC 96-119 (1996).

we supplement bidding credits and other special provisions with a limitation on the size of the entities [they would be required to] bid against."<sup>7</sup> The experience in the C block auction clearly demonstrates how large moneyed interests can take advantage of existing rules to exploit any opportunity to dominate the PCS business, thus driving out the small entrepreneurs and rural telephone companies for whom the C block "entrepreneur" restrictions were intended to benefit.<sup>8</sup>

Indeed, the Commission "established the entrepreneurs' block licenses to insulate smaller applicants from bidding against very large, well-financed entities".<sup>9</sup> Yet in the C block auction, five "entrepreneurial" companies--each supposedly with annual revenues of less than \$125 million and total assets of less than \$500 million-- have been able to command sufficient resources to bid nearly \$8 billion.<sup>10</sup> This fact indicates that rules restricting the ability of big players to finance bidders in the entrepreneurial blocks need to be strengthened substantially, not relaxed. In addition, incentive structures such as installment payment plans and bidding credits must be restructured, as we discuss below. Otherwise, the small businesses and rural telephone companies for whom these blocks were established will not be able "to realize meaningful opportunities for participation in broadband PCS".<sup>11</sup>

The 10 MHz blocks (D, E, and F) were established explicitly to encourage provision of a wider variety of PCS services, including specialized or "niche" applications.<sup>12</sup> Although the Commission also anticipated that 10 MHz licenses might

<sup>7</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Memorandum Opinion and Order*, PP Docket 93-253, FCC 94-285 (1994), para. 16, emphasis added.

<sup>8</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, para. 8, 16.

<sup>9</sup> *Fifth Report and Order* in PP Docket No. 93-253, FCC 94-178 (1994) at para. 24-91.

<sup>10</sup> As of round 84, the top five bidders had bid \$7.8 billion, after discount. (<http://www.fcc.gov>)

<sup>11</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, para. 16.

<sup>12</sup> *PCS Memorandum Opinion and Order*, 9 FCC Rcd at 4981.

be beneficial to cellular operators or for aggregation with 30 MHz (A, B, or C block) licenses,<sup>13</sup> we feel that such aggregation runs counter to Congress's mandate to "ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses".<sup>14</sup>

The 10 MHz blocks were established to encourage the full play of US innovative skill in creating a plethora of new services. It is this sort of entrepreneurial innovation which has enriched customers and made the US the world leader in telecommunications technologies and applications. The rules for auctioning the D, E, and, especially, F blocks should continue to promote this kind of innovation and the variety of new technologies and services, and financial and coverage flexibility that will result.

**Cellular operators and/or A, B, or C block PCS licensees should not be allowed to use 10 MHz licenses merely to aggregate spectrum to expand their current high-mobility services--or, worse, to "warehouse" the spectrum in order to forestall competition.** Clearly, this would contravene the Congressional mandate to "promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses".<sup>15</sup> Moreover, it would contradict a key aspect of the Commission's original rationale for allocating 10 MHz blocks.<sup>16</sup>

We agree whole-heartedly with the Commission's finding in the *Competitive Bidding Fifth Memorandum Opinion and Order* that "the public interest benefits of establishing an entrepreneurs' block outweigh the need to provide additional

<sup>13</sup>

*Id.*

<sup>14</sup>

47 U.S.C. Sec. 309(j)(3)(B).

<sup>15</sup>

*Id.*

<sup>16</sup>

*PCS Memorandum Opinion and Order*, 9 FCC Rcd at 4981.

opportunities for cellular operators".<sup>17</sup> Thus, we strenuously oppose any efforts to increase the amount of spectrum that any one licensee may acquire. Indeed, as we have argued before, there is a very real danger that without reasonable limits on spectrum aggregation, a few very large and very well financed corporations would be able to lock out innovative medium and smaller bidders.<sup>18</sup> We reiterate here our strong opposition to any relaxation in the spectrum aggregation limits.

Congress directed the Commission to "[avoid] excessive concentration of licenses and [disseminate] licenses among a wide variety of applicants",<sup>19</sup> and for good reason. Just as diversity of ownership of media encourages diversity of opinion in the public discourse, diversity among holders of PCS licenses will encourage innovation in the provision of PCS services. Increasing PCS spectrum aggregation limits would squelch this innovation, against Congressional intentions and the public interest.

As noted above, the Commission itself has concluded that the need to provide additional opportunities for cellular operators to aggregate spectrum from the PCS blocks does not outweigh the public interest benefits of establishing entrepreneurs' blocks.<sup>20</sup> In reaching this conclusion, the Commission specifically referred to its Congressional mandate that licenses be disseminated "among a wide variety of applicants, including small businesses [and] rural telephone companies".<sup>21</sup> We urge the Commission to reaffirm this position here.

**The Commission should keep at least one 10 MHz block (preferably the F block) set aside for its original purpose: innovative entrepreneurial applications.**

<sup>17</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, para. 16.

<sup>18</sup> Comments of Rendall and Associates, in PP Docket 93-253 at 5.

<sup>19</sup> 47 U.S.C. Sec. 309(j)(3)(B).

<sup>20</sup> *PCS Memorandum Opinion and Order*, 9 FCC Rcd at 4981.

<sup>21</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, para. 12.

**The Commission should adopt rules specifically prohibiting the aggregation of F block licenses with C, D, or E block licenses.** Licenses in the D and E blocks could still be used for aggregation with cellular or 30 MHz PCS licenses, if deemed in the public interest.

Adoption of rules prohibiting aggregation of F block spectrum would minimize the risk that nominal entrepreneurs, backed by financing from large corporate affiliates, would bid up licenses beyond the range of the small businesses and rural telephone companies for whom this 10 MHz "entrepreneurs' block" was established. Such a provision would be consistent with Congressional intent<sup>22</sup> and with the Commission's own beliefs.<sup>23</sup> Moreover, it would clearly be in the public interest.

**The Commission should adopt a rule limiting the total number of POPs which an applicant can win and still retain the provisions available to "small businesses".** Clearly, any entity with access to sufficient capital to meet system build-out requirements for more than five million POPs should not be considered to be a "small business" and, therefore, should not be eligible for the preferential installment payments or bidding credits available to small business bidders.

We are particularly concerned that unsuccessful C block bidders (especially, well financed bidders who withdrew from the C block auction because the bidding became "too expensive"<sup>24</sup>) would completely overwhelm the small businesses and rural telephone companies for whom the F block auction is so important. Many C block bidders, though unsuccessful in winning C block licenses, have nonetheless accumulated hundreds of millions of dollars in resources.<sup>25</sup> Allowing them to bid for F

<sup>22</sup> 47 U.S.C. Sec 309(j)

<sup>23</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, para. 8, 16.

<sup>24</sup> "Go Communications Bows Out of Bidding For Wireless License," *Wall Street Journal*, March 18, 1996.



block licenses would destroy both the rationale for and the spirit of the F block designation.

We believe that provisions for installment payments and bidding credits should be revised (as described below), and that these provisions should be available only to those winning licenses covering five million POPs or fewer.

We also believe that the (revised) provisions available to small business bidders in the F block auction should be extended to qualifying small business bidders--on the same terms--in the D and E block auction(s), as well. This certainly would not threaten larger players in the D and E block auction(s), yet it would further extend "meaningful opportunities for participation" to small businesses.

**The F block auction should be kept separate from the D and E block auction(s). We believe that the F block auction should precede the D and E block auction(s).**

In no case should the F block auction be scheduled after the D and E block auction(s). We are very concerned that if this were to happen then "last-chance", "desperation bidding" by all those who had been unsuccessful in the previous auctions would drive bid prices to unrealistically high levels. This dynamic was in evidence in the C block auctions, which represented the "last chance" to obtain 30 MHz licenses. Again, this would work exactly contrary to the intent of Congress,<sup>26</sup> the Commission's own policies,<sup>27</sup> and the public interest.

<sup>25</sup>

*Id.*

<sup>26</sup>

47 U.S.C. Sec. 309(j)(4)(D).

<sup>27</sup>

*Competitive Bidding Fifth Memorandum Opinion and Order*, para. 8, 12, 16.

If the F block auction is conducted prior to the auction(s) for the D and E blocks, then unsuccessful F block bidders will still have the chance to bid for D and E block licenses.

### **III. Addressing Specific Issues in the *Notice***

Given these concerns, RAA submits the following comments in response to specific issues raised in the March 20 *Notice* which we feel seriously threaten the meaningful participation of small businesses and rural telephone companies in the PCS business. We believe that these proposed modifications, if adopted, could help restore the original purpose for designating the F block for "entrepreneurs". that is, we think that the resulting incentive structure would help insulate the small business bidders by preventing large, moneyed interests from taking advantage of provisions intended to help small entities.

Control group equity structures. In this section the *Notice* asks whether there is a concern that C block winners might be disqualified from acquiring (we would add "bidding" for) F block licenses by virtue of the valuation of their C block licenses.<sup>28</sup> Our response is that entrepreneurs who have won C block licenses have substantially less need for F block licenses than smaller businesses and rural telephone companies who were unable to match the extremely high bids in the C block auction. Therefore, we believe that if the valuation of C block licenses would put an applicant over the eligibility thresholds, then such applicant should indeed be disqualified from bidding in the F

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<sup>28</sup> *Notice of Proposed Rulemaking*, FCC 96-119, at para. 33.

block auction. Clearly, anyone winning 30 MHz licenses is in less need of spectrum than smaller entities hoping merely for 10 MHz.

Installment payments. We propose that installment payment plans and bidding credit provisions be revised somewhat. We propose that two installment payment plans be adopted: one for small businesses and a second one for all other qualified bidders. Any bidders winning licenses covering more than five million total POPs would be ineligible for any installment payment plan. These bidders would be required to pay the full amounts of their bids under the same terms as for the A and B block auctions.

We propose that the first installment payment plan (that available to small businesses) be the same as the third plan currently available. That is, the plan would provide for the payment of interest at the ten-year US Treasury rate plus 2.5 percent and allow eligible entities to make interest-only payments for two years, with principle and interest amortized over the remaining eight years of the license term.

The second plan, applicable to all other bidders qualified to participate in the F block auctions and winning licenses covering less than five million total POPs, would be the same as the first plan currently available. That is, this plan would provide for the payment of interest at the ten-year US Treasury rate plus 3.5 percent, with principle and interest amortized over the term of the license.

In any case, any bidder winning licenses covering more than five million total POPs--even if the bidder originally qualified as a small business--would be ineligible for either installment payment plan. We are convinced that the only way to prevent abuse of the "small business" designation and the benefits associated with this designation is

to remove the designation and its benefits from any bidder demonstrating sufficient resources to win licenses covering more than five million total POPs.

We believe that these changes would be entirely consistent with a key stated rationale for establishing a 10 MHz entrepreneurs' block--namely to give smaller players meaningful opportunities to provide innovative broadband PCS services.<sup>29</sup> They would prevent heavily capitalized bidders from taking advantage of provisions intended to help small players and thereby help reduce the risk of hyperinflated bidding.

Bidding credits. Following the same rationale of helping small businesses participate without letting big winners take unfair advantage, we propose that the structure of bidding credits be similarly revised. Specifically, we propose adopting a single 25 percent discount plan available only to small businesses. As above, other bidders qualified to participate in the F block auction, as well as any bidders winning licenses covering more than five million total POPs, would not be granted any bidding credit.

We feel that a 25 percent credit would be modest, but meaningful for small businesses, and we believe that this would give smaller players a fair and reasonable way to leverage their financial resources in bidding for F block licenses. Again, as the experience in the C block auction has demonstrated, the small players need every fair and reasonable advantage that they can have in bidding against the larger, better financed players. Moreover, this again is entirely consistent with Congressional intent<sup>30</sup> and the Commission's stated policies.<sup>31</sup>

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<sup>29</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, para. 8, 12, 16. See also 47 U.S.C. Sec 309(j).

<sup>30</sup> 47 U.S.C. Sec 309(j)(3)(B), (4)(D).

<sup>31</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, para. 8, 12, 16.

Definition of "small business". As noted above, we do not feel that there is any problem presented by the possibility that the value of C block licenses might disqualify C block winners from bidding for F block licenses. Therefore, we argue that the value of C block licenses should be counted toward the \$500 million asset threshold. Not only would a C block license represent an asset of real economic value to such license holder, but also holders of 30 MHz C block licenses would have less need of additional 10 MHz licenses.

Extending small business provisions to the D and E blocks. As stated above, we believe that the installment payment and bidding credit provisions, modified as we have proposed, should be extended to small business and rural telephone company bidders in the D and E block auctions. Again, anything which might help these smaller entities participate meaningfully in the PCS business should be encouraged. Moreover, this would be consistent with Congressional intent,<sup>32</sup> Commission policy,<sup>33</sup> and the public interest.

Cellular/PCS cross-ownership. Given that the court has recognized the Commission's goal of avoiding excessive concentration of licenses as a permissible objective<sup>34</sup> (and reiterating that this is a Congressional intent),<sup>35</sup> we believe that the Commission should retain its PCS/cellular cross-ownership rule. It is likely that any such spectrum aggregation rule will be challenged as arbitrary by those intent on aggregating as much spectrum as possible. Absent an inquiry or other formal proceeding to assess the potential for and implications of concentration in the wireless

<sup>32</sup> 47 U.S.C. Sec 309(j)(3)(B), (4)(D).

<sup>33</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, para. 8, 12, 16.

<sup>34</sup> *Cincinnati Bell*, 69 F.3d at 764; *Notice of Proposed Rulemaking*, FCC 96-119, at para. 65.

<sup>35</sup> 47 U.S.C. Sec 309(j)(3)(B).

industry, it would be impossible for any agency to say what level of aggregation might be reasonable. Obviously, any move toward greater aggregation would reduce opportunities for smaller companies to participate meaningfully. Moreover, this would reduce the number of potential competitors--and, therefore, the potential for effective competition--in the wireless market.

We propose that the current PCS/cellular cross-ownership rules, as well as the 40 MHz PCS spectrum and the 45 MHz CMRS caps, be retained in their current form. Given the Congressional intent that excessive concentration of licenses be avoided and that licenses be disseminated among a wide variety of applicants,<sup>36</sup> we believe that the burden of proving that the current rules are overly restrictive is on those who wish to relax them.

Auction schedule. RAA strongly supports auctioning the F block licenses separately from those in the D and E blocks. As the Commission notes in its Notice, the separate-auctions approach would accommodate the difference in eligibility requirements for the F block auction.<sup>37</sup> As we discuss above, there is a great danger that bid levels will be driven beyond the reach of the small businesses and rural telephone companies for whom the F block "entrepreneurs" designation was established if these licenses are auctioned last. In no case should this be allowed to happen. We maintain that the optimal way of meeting the Congressional mandate that small businesses and rural telephone companies have meaningful opportunities to participate in PCS<sup>38</sup> is to auction the F block licenses prior to the D and E block auction(s).

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<sup>36</sup> 47 U.S.C. Sec. 309(j)(3)(B).

<sup>37</sup> *Notice of Proposed Rulemaking*, FCC 96-119, at para. 86.

<sup>38</sup> 47 U.S.C. Sec. 309(j)(4)(D)

#### **IV. Conclusion**

In the C block auction, heavily financed players in the guise of small businesses turned the idea of an "entrepreneurs' block" on its head. In so doing, they have threatened to destroy any hopes that truly small businesses and rural telephone companies have for participating in meaningful ways in the broadband PCS business.

RAA, perhaps typical of these small players, has spent more than \$3 million and over two-year's effort developing innovative technology and services ideally suited for rural telephone company and other small-business applications. We believe that this is precisely the kind of innovation envisioned by Congress and the Commission in establishing the entrepreneurs' blocks. We now stand to lose this substantial investment to large moneyed interests who have used the existing rules merely to enrich themselves.

We believe that the modifications we have proposed would help protect the interests of smaller entities in the remaining PCS auctions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Rendall", with a stylized flourish at the end.

David S. Rendall  
President  
Rendall and Associates  
5000 Falls of Neuse Road  
Raleigh, NC 27609